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John Andrew Malthouse v Cyril Steven & Ors

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HIGH COURT (KOTA KINABALU) — CIVIL CASE NO K22–31 OF 1999
RAVINTHRAN J
8 APRIL 2014

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Civil Procedure — Pleadings — Material facts — Whether special damages must be particularised and pleaded

Damages — Assessment — Appeal against assessment — Use of precedents — Whether recent precedents may be used — Whether only precedents between date of service of writ and date of judgment may be used

D

Damages — Assessment — Global award — All injuries suffered related to brain — Whether global award more appropriate than separate awards

E

Damages — Assessment — Nursing care — Multiplier — Multiplicand — Determining life expectancy — Whether statutory multiplier in s 28 of the Civil Law Act 1956 may be used — Interest on award for future nursing care

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In 1996, the plaintiff, an expatriate from the United Kingdom, was working in Kota Kinabalu as a yacht maintenance specialist cum marina manager. The first defendant was an auxiliary policeman in the employ of the second and third defendants. On 26 February 1996, in the late evening, the first defendant stopped the vehicle of the plaintiff and asked for a lift. The plaintiff obliged. However, sometime later when the plaintiff stopped his vehicle for the first defendant to alight, the first defendant shot the plaintiff twice on the left side of his head at close range. The plaintiff survived but suffered serious brain injury. The first defendant pleaded guilty to causing grievous hurt and was sentenced to imprisonment. On 8 March 2001, the deputy registrar ('the DR') entered judgment against the second and third defendants with damages to be assessed ('the judgment'). The second and third defendants' appeals to the judge in chambers and to the Court of Appeal against the judgment were dismissed. The first defendant did not contest the case against him. The present appeals were against the assessment of the damages by the DR. The plaintiff appealed against: (i) the award of only £46,400 for future nursing care instead of RM3,501,913; and (ii) the dismissal of the claim for special damages. The second and third defendants appealed against: (i) the award RM500,000 for pain and suffering; (ii) the interest on RM500,000 at the rate of 8%pa from

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A 8 March 2001 to date of payment; (iii) pre-trial cost of nursing care of RM106,800; and (iv) interest on RM106,800 at 8%pa from 8 March 2001 to date of payment. The learned senior federal counsel ('the SFC') submitted RM500,000 was on the high side because the DR considered more recent precedents circa 2010. He submitted that the quantum of assessment should B have been made based between the date of service of the writ and the date of judgment only, ie 8 March 2001. Further, there was no direct evidence in respect of the life expectancy of the plaintiff. The plaintiff had merely tendered evidence in the form of a printout from the CIA (Central Intelligence Agency of the United States of America) website that stated that the life expectancy of C a United Kingdom male was 79 years old. Therefore, the SFC suggested that, in the alternative, the statutory multiplier in s 28 of the Civil Law Act 1956 ('the CLA') should be adopted for both the pre-trial and post-trial cost of care. The DR awarded pre-trial nursing care expenses in the sum of RM106,800. The multiplicand he used was £800 as the plaintiff produced evidence that D trained caregivers in the United Kingdom would charge around that rate per week. The used was 58 months. The DR presumably took into account the statutory multiplier under s 28 of the CLA.

Held:

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(1) The DR had applied recent precedents in assessing general damages for pain and suffering although 14 years had elapsed since the time of the shooting. Any drop in money value would have been compensated by the 8% interest per annum from the time of service of the writ. Awards for F general damages have to be based on awards in previous cases involving similar injuries. Furthermore, in the instant case, all the permanent injuries that the plaintiff suffered were all related to the brain injury. In the premises, a global award was more appropriate than separate awards. The assessment of the DR should have been made based on precedents G between the date of service of the writ and the date of judgment only, ie 8 March 2001. Hence, the award was reduced from RM500,000 to RM300,000 (see para 18).

(2) The nature of exemplary damages is that it is not compensatory damages but that it is punitive damages. Exemplary damages are limited to three H situations: (i) in the case of oppressive, arbitrary or unconstitutional actions by government servants; (ii) where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff; and (iii) where statute expressly authorised it. In the instant case, the claim for exemplary I damages fell under the first category. There is no fixed formula for awarding exemplary damages. Another principle that must be considered in assessing exemplary damages is whether the compensatory damages that were awarded are adequate. The DR gave no reason for awarding RM250,000 as exemplary damages. RM250,000 was unjustified as the

plaintiff had already been awarded RM300,000 for pain and suffering and loss of amenities. Hence, the award was reduced from RM250,000 to RM100,000 (see para 21).

(3) There was no direct evidence to the effect that the life expectancy of the plaintiff would be significantly shortened. The court cannot take judicial notice of the printout from the CIA website. In the absence of admissible evidence in respect of the life expectancy of a United Kingdom male, the present Malaysian male life expectancy of 72 years should be used to calculate the multiplier. The statutory multiplier in s 28 of the CLA would severely limit the award for costs of future nursing care as it is meant to calculate loss of earnings only. In respect of the multiplicand, the plaintiff, despite sustaining serious injuries, had not been reduced to 'vegetative state' or even a 'wheel chair existence'. He had still managed to work after the incident with the assistance of his wife for few years. The plaintiff had elected to live and work in Malaysia at the material time. Therefore any award, including an award for costs of nursing care, should be based on local rates. Hence, RM600 a month was reasonable for future nursing care. For the pre-trial cost of nursing care, ie between the time of the incident and the conclusion of the assessment hearing, the DR's decision to grant pre-trial costs of nursing care in the sum of RM106,800 was upheld (see paras 30–31).

(4) The future nursing care award of RM86,400 should not carry interest from the date of service of the writ because nursing care costs that would be incurred in the future are claimable immediately (see para 32).

(5) It is trite law that special damages must be particularised and pleaded. In the instant case, assessment of damages was only ordered in respect of general damages. Hence, the plaintiff's appeal in respect of the decision of the DR not to grant further special damages was dismissed (see para 33).

[Bahasa Malaysia summary

Pada tahun 1996, plaintif, pegawai dagang dari United Kingdom, telah bekerja di Kota Kinabalu sebagai pengurus pakar penyelenggaraan *yacht* merangkap pengurus marina. Defendan pertama adalah seorang anggota polis tambahan yang diambil kerja dengan defendan kedua dan ketiga. Pada 26 Februari 1996, pada lewat petang, defendan pertama menghentikan kenderaan plaintif dan meminta tumpang. Plaintif menurut. Walau bagaimanapun, beberapa ketika kemudian apabila plaintif menghentikan kenderaannya untuk defendan pertama turun, defendan pertama menembak plaintif dua kali pada bahagian kiri kepalanya pada jarak dekat. Plaintif terselamat tetapi mengalami kecederaan otak yang serius. Defendan pertama mengaku bersalah menyebabkan kecederaan parah dan dijatuhi hukuman penjara. Pada 8 Mac 2001, timbalan pendaftar ('TP') memasukkan penghakiman terhadap

defendan kedua dan ketiga dengan ganti rugi yang akan ditaksir ('penghakiman'). Rayuan defendan kedua dan ketiga kepada hakim dalam kamar dan kepada Mahkamah Rayuan terhadap penghakiman itu telah ditolak. Defendan pertama tidak mempertikaikan kes terhadapnya. Rayuan semasa ialah terhadap penilaian terhadap kerugian oleh TP. Plaintif membuat rayuan terhadap: (i) mengwardkan hanya £46,400 untuk penjagaan kejururawatan masa depan dan bukannya RM3,501,913; dan (ii) pengecualian tuntutan ganti rugi khas. Defendan kedua dan ketiga mengemukakan rayuan terhadap: (i) award RM500,000 bagi kesakitan dan penderitaan; (ii) faedah atas RM500,000 pada kadar 8% setahun dari 8 Mac 2001 hingga tarikh pembayaran; (iii) kos percubaan penjagaan kejururawatan daripada RM106,800; dan (iv) faedah atas RM106,800 pada kadar 8% setahun dari 8 Mac 2001 hingga tarikh pembayaran. Peguam kanan persekutuan ('SFC') yang bijaksana mengemukakan RM500,000 adalah keterlaluan kerana TP mempertimbangkan duluan baru-baru ini sekitar tahun 2010. Dia berhujah bahawa kuantum taksiran patut dibuat berdasarkan antara tarikh penyampaian writ itu dan tarikh penghakiman sahaja, iaitu 8 Mac 2001. Seterusnya, tidak ada keterangan langsung berkenaan dengan jangka hayat plaintif. Plaintif telah mengemukakan bukti semata-mata dalam bentuk cetakan dari CIA (Agensi Perisikan Pusat Amerika Syarikat). Laman web yang menyatakan bahawa jangka hayat lelaki United Kingdom berumur 79 tahun. Oleh itu, SFC mencadangkan, secara alternatif, pengganda berkanun dalam s 28 Akta Undang-Undang Sivil 1956 ('Akta') perlu diguna pakai untuk kedua-dua kos pra-perbicaraan dan selepas perbicaraan penjagaan. TP mengawardkan kos percubaan perbelanjaan penjagaan kejururawatan dalam jumlah RM106,800. Multiplicand yang digunakannya adalah £800 memandangkan plaintif mengemukakan keterangan yang penjaga terlatih di United Kingdom akan mengenakan kadar yang sama kira-kira seminggu. Penggunaan adalah 58 bulan. TP secara anggapan telah mengambil kira pengganda berkanun di bawah s 28 Akta.

Diputuskan:

(1) TP telah mengguna pakai duluan baru-baru ini dalam menilai ganti rugi am bagi kesakitan dan penderitaan walaupun 14 tahun telah berlalu sejak masa tembakan. Apa-apa penurunan nilai wang akan diberi pampasan dengan faedah 8% setahun dari masa penyampaian writ itu. Award untuk ganti rugi am perlu berdasarkan award dalam kes-kes sebelum ini yang melibatkan kecederaan yang sama. Tambahan pula, dalam kes ini, semua kecederaan kekal yang plaintif alami berkaitan dengan kecederaan otak. Dalam premis itu, award global adalah lebih sesuai daripada anugerah award berasingan. Penilaian TP patut dibuat berdasarkan duluan antara tarikh penyampaian writ itu dan tarikh penghakiman sahaja, iaitu 8 Mac 2001. Oleh itu, award tersebut telah dikurangkan daripada RM500,000 kepada RM300,000 (lihat perenggan 18).

(2) Sifat ganti rugi teladan adalah bahawa ia bukanlah ganti rugi bersifat pampasan tetapi ia adalah ganti rugi punitif. Ganti rugi teladan adalah terhad kepada tiga keadaan: (i) dalam hal penindasan, arbitrari atau tindakan oleh kakitangan kerajaan yang tidak mengikut perlembagaan; (ii) di mana kelakuan defendan telah dikira olehnya untuk membuat keuntungan untuk dirinya sendiri yang mungkin melebihi pampasan yang perlu dibayar kepada plaintif; dan (iii) di mana telah dinyatakan dengan jelas oleh statut. Dalam kes ini, tuntutan untuk ganti rugi teladan jatuh di bawah kategori pertama. Tidak ada formula tetap untuk mengawardkan ganti rugi teladan. Satu lagi prinsip yang perlu dipertimbangkan dalam menilai ganti rugi teladan ialah sama ada ganti rugi pampasan yang diberikan adalah mencukupi. TP tidak memberikan sebarang sebab untuk mengawardkan RM250,000 sebagai ganti rugi teladan. RM250,000 adalah tidak wajar kerana plaintif telah diawardkan RM300,000 bagi kesakitan dan penderitaan dan kehilangan kemudahan. Oleh itu, award itu telah dikurangkan daripada RM250,000 kepada RM100,000 (lihat peranggan 21).

(3) Tiada keterangan langsung yang bermaksud bahawa jangka hayat plaintif akan dipendekkan dengan ketara. Mahkamah tidak boleh memberi pengiktirafan kehakiman cetakan dari laman web CIA itu. Jika tiada keterangan boleh diterima berkenaan dengan jangka hayat lelaki United Kingdom, jangka masa kini Malaysia lelaki hidup 72 tahun boleh digunakan untuk mengira penggandaan. Pendarab berkanun dalam s 28 Akta teruk akan menghadkan award untuk kos penjagaan kejururawatan masa depan kerana ia bertujuan untuk mengira kehilangan pendapatan sahaja. Berkenaan dengan multiplicand itu, plaintif, meskipun mengalami kecederaan serius, tidak parah sehingga 'vegetative state' atau pun 'wheel chair existence'. Dia masih mampu untuk berkerja selepas insiden itu dengan bantuan isterinya untuk beberapa tahun. Plaintif telah memilih untuk menetap dan bekerja di Malaysia pada waktu material. Oleh itu apa-apa award, termasuk award untuk kos penjagaan kejururawatan, sepatutnya berdasarkan kadar tempatan. Maka, RM600 sebulan adalah munasabah untuk penjagaan kejururawatan masa hadapan. Untuk kos percubaan penjagaan kejururawatan, iaitu antara masa insiden itu dan keputusan perbicaraan taksiran itu, keputusan TP untuk membenarkan kos percubaan penjagaan kejururawatan dalam jumlah RM106,800 disahkan (lihat perenggan 30–31).

(4) Award penjagaan kejururawatan masa depan RM86,400 tidak dikenakan faedah dari tarikh penyampaian writ itu kerana kos perawatan yang akan dilakukan pada masa akan datang boleh dituntut serta-merta (lihat perenggan 32).

(5) Ia adalah undang-undang biasa ganti rugi khas hendaklah dibutirkan dan diplidkan. Dalam kes ini, penilaian ganti rugi hanya diperintahkan

terhadap ganti rugi am. Oleh itu, rayuan plaintif berkenaan dengan keputusan TP tidak mengawardkan ganti rugi khas telah ditolak (lihat perenggan 33).]

Notes

For cases on appeal, see 6 *Mallal's Digest* (4th Ed, 2014 Reissue) paras 278–280.

For cases on material facts, see 2(4) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 6796–6811.

Cases referred to

Ahmad Daman Huri bin Hussein v Koo Chin Yau [1990] 3 MLJ 53, HC (refd)
Bujang bin Mat & Anor v Lai Tzen Hai & Anor [2004] 6 MLJ 376, HC (refd)
Cheng Siak Hor t/a under Penang Trading & Transport Agency & Anor v Rozali bin Ahmad [2002] 2 MLJ 275; [2002] 4 CLJ 223, HC (refd)
Chong Nyan Lai v Abdul Ghani b Othman [2010] 1 PIR [11] (refd)
Chong Siew Chiang v Chua Ching Geh & Anor [1995] 1 MLJ 551, HC (refd)
Cunningham v Harrison [1973] QB 942, CA (refd)
Dass A/L Darmalingam v Mohd Fauzi b Mohd Salleh & Another [2011] 1 PIR 46 (refd)
Dr Yusuff bin Hj Mansur v Changkat Jering Sdn Bhd & Anor [1997] 5 MLJ 530, HC (refd)
Inderjeet Singh a/l Piara Singh v Mazlan bin Jasman & Ors [1995] 2 MLJ 646, HC (refd)
Kalaiarasan a/l T Sukumaran v Khor Lye Choon [2011] 2 PIR [6] (refd)
Kassim b Ibrahim & Anor v Syed Khodri b Syed Abdul Aziz [2009] 2 PIR [25] (refd)
Liong Thoo v Sawiyah & Ors [1982] 1 MLJ 286 (refd)
M Kumaresan A/L Muniandy v Gan Yew Peng [2011] 2 PIR [35] (refd)
Marappan & Anor v Siti Rahmah bte Ibrahim [1990] 1 MLJ 99, SC (refd)
Mohd Amiruddin bin Kamurudin & Another v Fazilah Bt Abdul & Another [2008] 1 PIR [35] (refd)
Mohd Azri b Embong & Anor v Wakil wakil Kediri Abdul Razol b Arifin, Si mati [2008] 2 PIR [33] (refd)
Muhamad Ayub Zulkifli v Zolazree Zolkeflee & Anor [2011] 1 LNS 1428, HC (refd)
Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324, FC (refd)
Rookes v Barnard [1964] AC 1129, HL (refd)
Sam Wan Hoong v Kader Ibramshah [1981] 1 MLJ 295, FC (refd)
Sin Heap Lee-Marubeni Sdn Bhd v Yip Shou Shan [2005] 1 MLJ 515, CA (refd)
Syarizan bin Sudirmin (a child claimed through his father and his attorney Sudirmin bin Selamat) & Ors v Abdul Rahman bin Bukit & Anor [2010] 8 MLJ 530; [2010] 3 CLJ 877, HC (folld)
Tan Yaw Soon & Anor v Teng Sian Loong Enterprise Sdn Bhd [1994] 1 MLJ 239, HC

Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1993] 1 MLJ 443, HC (refd)
Wong Li Fatt William (an infant) v Haidawati bte Bolhen & Anor [1994] 2 MLJ 497, HC (refd)
Zulsafari bin Ab Ghani & Anor v Shahril bin Idris [2002] 7 MLJ 436; [2002] 3 CLJ 187, HC (refd)

Legislation referred to

Civil Law Act 1956 s 28

Mary Lee (Lee & Kong) for the plaintiff.
Rahazlan Affendi (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

Ravinthran J:

INTRODUCTION

[1] There are two appeals from the decision of the deputy registrar in chambers pending before me. The first appeal is by the plaintiff and the second appeal is by the second and third defendants. The decision of the deputy registrar was in respect of assessment of damages. The brief facts relating to the belated assessment hearing may be stated as follows. In 1996, the plaintiff, an expatriate from the United Kingdom, was working in Kota Kinabalu as a yacht maintenance specialist cum marina manager. The first defendant was an auxiliary policeman in the employ of the second and third defendants. On 26 February 1996, in the late evening, the first defendant stopped the vehicle of the plaintiff and asked for a lift. The plaintiff obliged. However, sometime later when the plaintiff stopped his vehicle for the first defendant to alight, the first defendant shot the plaintiff twice on the left side of his head at close range. A third shot hit the roof of the vehicle. The plaintiff survived but suffered serious brain injury. The first defendant was charged with causing grievous hurt under s 338 of the Penal Code. He pleaded guilty and was sentenced to imprisonment. The first defendant's reason for shooting the plaintiff is unclear and remains a mystery although he claimed in the criminal court that the plaintiff wanted to snatch his bag. On 8 March 2001, the deputy registrar entered judgment against the second and third defendant with damages to be assessed pursuant to an unless order made by the High Court judge. This judgment was appealed against by the second and third defendants to the judge in chambers. It was dismissed. The appeal to the Court of Appeal was dismissed on 19 January 2011. As for the first defendant, he did not contest the case against him and judgment in default was entered against him. The trial of the assessment of damages commenced on 23 January 2008 before the deputy registrar. It only concluded on 10 December 2010. The plaintiff called eight witnesses including five specialist doctors to testify as to his medical condition.

The deputy registrar delivered his decision on damages on 28 February 2013. The instant appeal is from this decision.

PRELIMINARY ISSUES

[2] The assessment hearing in question was conducted pursuant to the judgment dated 8 March 2001. The Court of Appeal had affirmed this judgment as the appeal of the second and third defendants was dismissed. Before me, the second and third defendants disputed the interest rate applicable to the general damages that were assessed. This issue can be answered by reference to the High Court order dated 8 March 2001. The other issue that can be answered by reference to the said order is the issue of special damages. The plaintiff had applied for special damages in the assessment hearing before the deputy registrar and this application was disputed by the second and third defendants. Therefore, for ease of reference, I shall set out below the order dated 8 March 2001:

> PURSUANT to the Order of this Honourable Court dated 08.03.2001 IT IS THIS DAY ADJUDGED that the 2nd and 3rd Defendants do jointly and severally pay the Plaintiff:-
>
> (1) General damages under paragraph 12 of the Amended Statement of Claim to be assessed;
>
> (2) Special damages under paragraph 12 of the Amended Statement of Claim;
>
> (3) Interest on the General Damages in prayer (1) above at the rate of 8% per annum from the date of service of Writ to 08.03.2001 under Section 11 of the Civil Law Act 1956;
>
> (4) Interest on the Special Damages in prayer (2) above at the rate of 8% per annum from the date of the shooting, that is, 26.02.1996 to 08.03.2001 under Section 11 of the Civil Law Act 1956;
>
> (5) Exemplary and/or aggravated damages to be assessed on the facts and matters stated in paragraph 13 of the Amended Statement of Claim;
>
> (6) Statutory interest on the Judgment sum awarded as damages at the rate of 8% per annum from 08.03.2001 to the date of full payment; and
>
> (7) Costs.

I shall address the interest issue and the claim for special damages in the later part of this judgment.

CLAIM OF THE PLAINTIFF AT THE ASSESSMENT HEARING

[3] Before the deputy registrar, the plaintiff claimed damages under the following heads:

(i) general damages for pain and suffering and loss of amenities of life;

(ii) general damages for costs of future medical expenses;

(iii) general damages for loss of earning capacity;

(iv) general damages for cost of continual care and supervision of the plaintiff;

(v) special damages totaling RM14,311.66 from date of filing of writ to the date of trial; and

(vi) assessment of exemplary and/or aggravated damages.

DECISION OF THE DEPUTY REGISTRAR

[4] Under item (i), ie general damages for pain and suffering and loss of amenities, the deputy registrar awarded RM500,000 with interests at the rate of 8%pa from the date of service of the writ to 8 March 2001. He also awarded interest of 8%pa from 8 March 2001 to date of payment. Under item (ii), ie general damages for future medical expenses, he awarded RM60,000 at the rate of 8%pa from the date of service of the writ to 8 March 2001. He awarded statutory interest 8%pa from 8 March 2001 to date of payment. There was no appeal by either party against this award. Under item (iii), ie general damages for loss of earning capacity, the deputy registrar made no award. The plaintiff appealed against this award in the notice of appeal to judge in chambers. However, in the written submissions of counsel for the plaintiff, the appeal against the decision of the deputy registrar not to make any award for loss of earning capacity was abandoned. Item (iv) is in respect of pre-trial and post trial nursing care of the plaintiff. For pre-trial cost of nursing care, the deputy registrar awarded RM106,800, at the rate of 8%pa from the date of service of the writ to 8 March 2001. He also awarded statutory interest 8%pa from 8 March 2001 to date of payment. For post-trial cost of nursing care, the deputy registrar awarded £46,400 at the rate of 8%pa from January, 2001 to the date of full payment. Under item (v), ie special damages totaling RM14,311.66 which were incurred between the date of the judgment dated 8 March 2001 and the date of the assessment of damages, the deputy registrar did not make any award. Under item (vi), ie for exemplary and aggravated damages, the deputy registrar granted RM250,000 as exemplary damages at the rate of 8%pa from the date of service of the writ to 8 March 2001. He awarded statutory interest 8%pa from 8 March 2001 to date of payment. However, he did not make any award for aggravated damages.

APPEAL OF THE PLAINTIFF

[5] The plaintiff appealed against the decision of the deputy registrar in the notice of appeal to judge in chambers dated 14 March 2013 in respect of the part of his decision that addressed the following matters:

(a) the dismissal of the claim for loss of earning capacity. This appeal was abandoned at the submission stage and therefore shall not be considered in this judgment;

(b) the award of only £46,400 for future nursing care. Counsel for the plaintiff had submitted a claim for RM3,501,913; and

(c) the dismissal of claim for special damages.

APPEAL OF THE SECOND AND THIRD DEFENDANTS

[6] The second and third defendants appealed against the following awards:

(a) the award RM500,000 for pain and suffering;

(b) the interest on RM500,000 at the rate of 8%pa from 8 March 2001 to date of payment;

(c) pre-trial cost of nursing care of RM106,800 at the rate of 8%pa from the date of service of the writ to 8 March 2001; and

(d) statutory interest on RM106,800 at 8%pa from 8 March 2001 to date of payment.

INTEREST AND DECREASE IN MONEY VALUE

[7] I shall first address the issue of interests as the learned senior federal counsel appeared to suggest in his submission that interest on damages from 8 March 2001 would lead to unjust enrichment. Another argument of the senior federal counsel that is related to this issue is that the deputy registrar should have considered the fact that the recent authorities that were cited to him had taken into account inflation and that appropriate adjustment in money value were made by the courts in those cases. This issue has arisen because the instant suit was filed in 1999 but for various reasons the assessment hearing was only concluded in 2013. In my opinion, the interest issue is a non-issue for the reason that the judgment of the High Court dated 8 March 2001 was affirmed by the Court of Appeal. In the said judgment, the court ordered interest at 8%pa on general damages from the service of the writ until full payment. In the deputy registrar's judgment at the conclusion of the assessment hearing on 28 February 2013, interests of 8%pa was granted from date of service of the writ to date of judgment ie 8 March 2001. He also granted statutory interest from 8 March 2001 to date of payment. However, he did not order two set-of interests at 8%pa to run simultaneously. In the premises, the order of the deputy registrar in respect of interest in his judgment dated 28 February 2013 is consonant with the judgment of the High Court dated 8 March 2001 which is the basis of the assessment hearing.

[8] The related argument of the senior federal counsel is that the deputy

registrar had taken into account recent cases that awarded higher damages compared to cases decided in 2001. He submitted that this was not necessary as interest rate of 8%pa from the date of service of the writ until full payment had been provided in the judgment of the High Court dated 8 March 2001. In my view, there is merit in this point although the use of comparables in awarding damages is not an exact science. The learned deputy registrar should have borne in mind that recent comparables had made adjustment for drop in money value. I shall address this point when considering the award for pain and suffering.

AWARD FOR PAIN AND SUFFERING AND LOSS OF AMENITIES

[9] The deputy registrar awarded RM500,000 under this head of damages. Only the defendants have appealed against this award. Counsel for the plaintiff and the senior federal counsel have generally not quarrelled over the principles applicable in assessing damages under this head. In *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324, Syed Agil Barakbah FJ said at p 334:

> It has to be borne in mind that damages for personal injuries are not punitive and still less a reward. They are simply compensation that will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act, so far as money can compensate (see *British Transport Commission v Gourley* [1956] AC 185 at p 206 and *H West & Son Ltd v Shephard* [1963] 2 All ER 625). The award under general damages should be a global sum commensurate with the injury sustained and not a full compensation which might result in ruinous consequences to the defendant.

[10] In the instant case, the plaintiff is not only claiming for pain and suffering but also for loss of amenities. The plaintiff was shot twice in the head by the first defendant. The plaintiff called five medical specialists to testify on the extent of his injuries and the permanent disabilities that he suffers as a result of the callous act of the first defendant. As can be imagined, the plaintiff experienced horrible pain and anxiety in the immediate aftermath of the shooting. After the shooting, only superficial suturing was done on his head to deal with gunshot injuries. As the plaintiff was conscious he suffered acutely and was distressed at the possibility of lapsing into a vegetative state. As nothing more could be done for him at the Kota Kinabalu Hospital, he was medically evacuated to Singapore when he underwent immediate brain surgery. The gunshot entry wounds had fractured the left side of his skull besides causing brain tissue injury. Therefore part of his left skull was removed and stitched with skin covering. Only about six months later, another surgery was performed to implant a plastic covering. However, some bullet fragments are still lodged to this day in his brain as it is too risky to attempt any removal by surgical operation. The major permanent disabilities that the plaintiff now suffers are visual field loss and organic personality disorder. He suffered brain scarring as well and is at risk from developing brain abscess and seizures. The

evidence of the five medical specialists in respect of the treatment administered to the plaintiff and the permanent disabilities caused by the brain injury are lengthy. Learned counsel for the plaintiff summarised their evidence and the evidence of the others witness in respect of the lifestyle changes that the plaintiff had to endure as follows:

(a) the plaintiff was 45 years and four months old at the time of the shooting and in the prime of his life professionally, socially and personally. The plaintiff sustained severe and extensive fracture to his skull on the left side of his head;

(b) he suffered severe compound, extensive and irreversible brain injuries to the left (dominant) parietal lobe of his brain;

(c) his brain was contused and swollen and he was in severe pain and writhing in agony;

(d) he was hospitalised for about one month from 16 February 1996–15 March 1996;

(e) he underwent craniotomy surgical operation and debridement for gun shot wounds to the left side of his head on 29 February 1996 lasting 6 1/2 hours;

(f) two large and several small bullet fragments embedded deep in the plaintiff's brain could not be removed surgically and effect of the remaining residual bullet fragments on his prognosis is uncertain;

(g) the plaintiff was left without the left side of his skull for six months with only the skin stitched over his open skull to allow the swelling in his brain to subside;

(h) he was hospitalised for ten days in August 1996 and underwent a left cranioplasty operation lasting 3 1/2 hours to fit and secure a plastic plate to replace that part of the skull that had been damages by the gunshots;

(i) he suffered resulting organic personality disorder and associated personality changes which is continuing;

(j) he suffered severe permanent and irreversible disabilities and intellectual impairment including greatly impaired ability for speech, reading, writing and calculation;

(k) he suffered severe and permanent impairment, curtailment and loss of basic life and social skills, daily frustration and embarrassment;

(l) he suffered extensive right sided visual field loss in both eyes due to permanent damage to his left optic tract;

(m) he suffered irreparable hearing impairment/deafness in both ears;

(n) he suffered extensive, progressive and irreversible gliosis/scarring of brain tissue;

(o) he suffered impending risk of developing brain abscess, seizures/fits due to residual copper jacket lead bullet fragments remaining in his brain which contained copper, a reactive metal;

(p) he suffered loss of ability do to the job/profession he was trained and qualified for and enjoyed doing;

(q) he lost the ability to resume his previous employment and profit sharing joint venture business for which he was trained and qualified;

(r) he lost the ability to resume particular hobbies and sports he enjoyed including reading, diving, participating in international sailing regattas;

(s) he suffered severe loss of enjoyment of life and deprivation of pleasures of ordinary life experiences;

(t) he is fully aware and conscious all this while since the gunshot wounds of his disabilities, loss of opportunities and unfavourable prognosis which has increased his pain and suffering; and

(u) he is constantly dependant on others and has to be supervised, guided and assisted in his daily activities which are demoralising, demeaning and frustrating for him.

[11] After taking into account, the depreciation in money value since the time of the incident, she submitted before the deputy registrar that an award of RM1.2m is fair and reasonable for pain and suffering. However, as I said earlier, the plaintiff did not appeal against the award of RM500,000 for pain and suffering and loss of amenities. Counsel for plaintiff identified three major components of the plaintiff's pain and suffering and loss of amenities as a result 15 of the shooting incident. They are:

(a) traumatic, severe and extensive brain injury. She submitted that RM594,000 is reasonable;

(b) permanent right sided visual field loss in both eyes. She submitted that RM216,000 is reasonable; and

(c) organic personality disorder. She submitted that RM274,000 is reasonable.

[12] My view on learned counsel for the plaintiff's submission is as follows. Firstly, I do not think it is appropriate to take into account the drop in money value between 2001 and 2013 as in the judgment dated 8 March 2001, interests at the rate of 8%pa from the date of service of the writ to 8 March 2001 and until full payment had been provided. The depreciation in the

Malaysian Ringgit or inflation would have been roughly compensated by the 8%pa interest rate. Secondly, the issue at hand is not whether RM1.2m damages for pain and suffering is more appropriate. This is because the plaintiff did not appeal against the award of RM500,000 granted by the deputy registrar for pain and suffering. I have already ruled that the belated supplementary notice of appeal against this award is not valid. Thus, there is no appeal by the plaintiff against the award of RM500,000. Although, an appeal from the decision of the deputy registrar is a rehearing, the court should not be concerned with matters that are not the subject of an appeal. In *Tan Yaw Soon & Anor v Teng Sian Loong Enterprise Sdn Bhd* [1994] 1 MLJ 239 that was cited by the senior federal counsel, the court said as follows:

> Since there is no counter appeal by the plaintiffs over their application under O 18, this appeal before me will proceed only against the decision of the SAR in making the order pursuant to O 81 of the RHC. The notice of appeal by the defendant confines only to the order made by the SAR. Though an appeal under O 56 r 1 of the RHC is by way of rehearing, the appellate court is not to be concerned with any matter not appealed against.

[13] In respect of the appeal by the defendants, the learned senior federal counsel has submitted RM500,000 was on the high side because the learned deputy registrar considered more recent precedents circa 2010. He submitted that the quantum of assessment should have been made based between the date of service of the writ and the date of judgment only, ie 8 March 2001.

[14] The cases cited by counsel for the plaintiff are as follows:

(a) *Wong Li Fatt William (an infant) v Haidawati bte Bolhen & Anor* [1994] 2 MLJ 497. The three year old plaintiff suffered severe brain damage and epilepsy secondary to the head injury. He was rendered dependent on others for his basic needs for the rest of his life. He could feel pain but was unaware of his condition or that he was suffering. His life-span was also shortened as a result of his injuries. The court awarded RM190,000 for pain and suffering and loss of amenities;

(b) *Inderjeet Singh a/l Piara Singh v Mazlan bin Jasman & Ors* [1995] 2 MLJ 646. The plaintiff suffered brain injury, partial quadriplegia and fractures to limbs. He was mostly confined to a wheelchair and required full time supervision. The court awarded RM244,000 as general damages for pain, suffering and loss of amenities;

(c) *Dr Yusuff bin Hj Mansur v Changkat Jering Sdn Bhd & Anor* [1997] 5 MLJ 530. As a result of the accident, the plaintiff suffered mental illness known as 'manic depressive psychosis'. The plaintiff suffered loss of intellectual and cognitive functioning and he showed impairment in reasoning logical thinking and an impaired ability to plan and organize tasks. The High Court awarded RM110,000 for the brain injury. The

court noted that as the plaintiff was a 'conscious sufferer', his condition would be particularly distressing to him;

(d) in *Bujang bin Mat & Anor v Lai Tzen Hai & Anor* [2004] 6 MLJ 376, the plaintiff suffered severe head injuries which reduced him to a 'vegetative state'. The award of RM200,000 by the sessions court was not disturbed by the High Court.

(e) in *Mohd Azri b Embong & Anor v Wakil wakil Kediri Abdul Razol b Arifin, Si mati* [2008] 2 PIR [33], the sessions court awarded RM200,000 for severe brain injury which resulted in visual field reduction, double vision, irreversible damage to the optic nerve, memory impairment, personality change and inability to pursue normal lifestyle;

(f) in *Kassim b Ibrahim & Anor v Syed Khodri b Syed Abdul Aziz* [2009] 2 PIR [25], the sessions court awarded RM350,000 for severe head injury which resulted in large subdural hemorrhage, right frontal contusion that caused seizures, cognitive deficits, and deformity as the bone flap was removed;

(g) in *Chong Nyan Lai v Abdul Ghani b Othman* [2010] 1 PIR [11], the sessions court awarded RM300,000 for severe head injuries that resulted in neurological disabilities and persistent vegetative state;

(h) in *Syarizan bin Sudirmin (a child claimed through his father and his attorney Sudirmin bin Selamat) & Ors v Abdul Rahman bin Bukit & Anor* [2010] 8 MLJ 530; [2010] 3 CLJ 877 the High Court awarded the 15 year old plaintiff RM300,000 for head injury that resulted in paraplegia; and

(i) in *Kalaiarasan a/l T Sukumaran v Khor Lye Choon* [2011] 2 PIR [6], the sessions court awarded RM350,000 to the plaintiff for severe head injuries (very severe cerebral concussion (diffuse brain injury) intracelebral hemorrhaged, cerebral oedemaoud brain damage resulting in permanent dysorthria and some impairment of mental functions, permanent weakness of the right side due to right hemiparesis and inability to stand and walk independently.

[15] The learned senior federal counsel did not dispute that the plaintiff suffered serious brain injury and is now afflicted with loss of amenities. However, he cited cases where a lesser award had been made for more serious injuries in the case of 'conscious sufferers' such as the plaintiff in the instant case. Some of these cases were also cited by counsel for the plaintiff.

(a) in *Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99, the plaintiff suffered severe head injuries with contusion of the brain and fracture of the right fronto-parietal bone of the skull which caused

complete paralysis of her limbs. The judgment did not indicate that the plaintiff in that case was reduced to a 'vegetative state'. The plaintiff was awarded RM180,000 for pain and suffering and loss of amenities;

(b) the learned senior federal counsel pointed out that in *Wong Li Fatt William (an infant) v Haidawati bte Bolhen & Anor* which was also cited by counsel for the plaintiff, the accident victim could feel pain though he was in 'vegetative state' but the court awarded only RM190,000 in 1994; and

(c) finally, the senior federal counsel submitted *Syarizan bin Sudirmin & Ors v Abdul Rahman bin Bukit & Anor* is the precedent that is closest to the instant case. In that case, the victim who was deliberately kicked off from his motorcycle by a policeman was rendered a paraplegic and suffered multiple loss of amenities. He was also a conscious sufferer. His sufferings were summarised by VT Singham J as follows:

(1) He was hospitalized for the total period of 5 1/2 years.

(2) There is no hope that his paraplegia conditions will improve.

(3) He has undergone various operations and treatment and he had to endure extensive and prolonged misery of agony.

(4) He has no control of bladder or bowels.

(5) There have to be mechanical evacuation of faeces and is done approximately three times a day. There has to be evacuation of urine by catheter.

(6) His brain and intelligence are unimpaired.

(7) He has to be moved frequently to avoid body sores if he is too long in one position.

(8) He suffers a great amount of discomfort.

(9) He has lost almost all the amenities.

(10) He has lost the chances of employment and of the pleasures and excitements that add to the brightness of life.

(11) His life is one of constant discomfort and constant expense, (see *Morey v Woodfiled* [1963] 3 All ER 533)

(12) He will get complications like pressure sore and urinary tract infections from time to time.

For pain and suffering and loss of amenities occasioned by his paraplegic condition, the plaintiff was awarded only RM300,000 in 2010.

[16] Although RM300,000 was awarded in *Syarizan bin Sudirmin & Ors v Abdul Rahman bin Bukit & Anor*, it must be noted that circa 2010, awards by

most courts for paraplegia was only in the region of RM200,000. The said cases are as follows:

(a) in *M Kumaresan A/L Muniandy v Gan Yew Peng* [2011] 2 PIR [35], RM150,000 was awarded for paraplegia below the umbilicus;

(b) in *Dass A/L Darmalingam v Mohd Fauzi b Mohd Salleh & Another* [2011] 1 PIR [46], RM200,000 was awarded;

(c) in *Zulsafari bin Ab Ghani & Anor v Shahril bin Idris* [2002 7 MLJ 436; [2002] 3 CLJ 187, RM 190,800 was awarded for complete paraplegia;

(d) in *Cheng Siak Hor t/a under Penang Trading & Transport Agency & Anor v Rozali bin Ahmad* [2002] 2 MLJ 275; [2002] 4 CLJ 223, RM150,000 was awarded for complete paraplegia; and

(e) in *Mohd Amiruddin bin Kamurudin & Another v Fazilah Bt Abdul & Another* [2008] 1 PIR [35], RM160,000 was awarded for complete paraplegia below the waist.

[17] Thus the argument of the senior federal counsel is that even RM300,000 for pain and suffering and loss of amenities in the instant case is high as the assessment should have been based on precedents circa 2001. He also pointed out that the plaintiff in *Syarizan bin Sudirmin & Ors v Abdul Rahman bin Bukit & Anor* was in a worse position than the instant plaintiff as he was rendered paralysed waist below. The principal permanent disabilities of the plaintiff in the instant case are cognitive impairment, visual field loss and organic personality disorder. The summary that he extracted from the medical report on the plaintiff by the defendants' panel of experts is as follows:

(i) Impaired cognitive function:

verbal functioning impairment including writing, repeating, verbal memory, verbal calculation and ability to understand sentences.

(ii) Personality change:

psychiatric condition of 'Organic Personality Disorder' (ICD-10).

decreased ability to comprehend complex written words and to write down his thoughts.

irritability and depression from time to time.

previous suicidal thoughts and hyper vigilance and excessive fear following the attack.

(iii) Permanent visual field defect on his right side (right Homonymous Hemianopia).

(iv) Bilateral moderate sensorineural hearing impairment.

(v) Scarring which is not significantly increasing in size and does not have any bearing on the Plaintiff's life span.

[18] Although, the senior federal counsel was of the view that precedents circa 2001 should have used by the deputy registrar, he was agreeable to a global award of RM300,000 for pain and suffering and loss of amenities. In my view, there is merit in the submission of the senior federal counsel. The learned deputy registrar in this case, had applied recent precedents in assessing general damages for pain and suffering although 14 years had elapsed since the time of the shooting. As I said earlier, any drop in money value would have been compensated by the 8% interest pa from the time of service of the writ. I agree with counsel for the plaintiff that the plaintiff had led an active life with numerous outdoor sporting interests such as yachting and therefore his present condition should be particularly distressing to him. However, awards for general damages has to be based on awards in previous cases involving similar injuries (see *Sam Wan Hoong v Kader Ibramshah* [1981] 1 MLJ 295). Furthermore, in the instant case, all the permanent injuries that the plaintiff suffers now are all related to the brain injury. In the premises, a global award is more appropriate than separate awards. Taking *Syarizan bin Sudirmin & Ors v Abdul Rahman bin Bukit & Anor* as a guide, in my view, RM300,000 is reasonable. I agree with the senior federal counsel that the plaintiff was worse off in that case. That being the case, in 1999 or 2001, an award of RM300,000 can even be considered generous for the injuries suffered by the plaintiff. As the assessment of the deputy registrar should have been made based on precedents between the date of service of the writ and the date of judgment only, ie 8 March 2001, I am minded to reduce his award of RM500,000 to RM300,000.

EXEMPLARY DAMAGES

[19] The learned deputy registrar when pronouncing judgment on 28 April 2013, said that he granted RM500,000 as general damages for pain and suffering and loss of amenities and RM250,000 as exemplary damages. However, in his written grounds dated 13 May 2013, it is stated that the award for general damages for pain and suffering is RM750,000. However, the written grounds makes no mention of the award of RM250,000 for exemplary damages. It is obvious that the learned deputy registrar made an error in his grounds of decision. In any event, the relevant binding judgment is the judgment pronounced on 28 April 2013. Counsel for the plaintiff has not appealed against the award of RM250,000. However, the defendants have appealed against the said award as being excessive. The learned senior federal

counsel submitted that RM50,000 which was granted in *Syarizan*'s case is more reasonable. The nature of exemplary damages is that it is not compensatory damages but that it is punitive damages. As stated by VT Singham J in *Syarizan bin Sudirmin & Ors v Abdul Rahman bin Bukit & Anor*, it is to express the court's disapproval. Since the case of *Rookes v Barnard* [1964] AC 1129, it is generally accepted that exemplary damages are limited to three situations:

(a) in the case of oppressive, arbitrary or unconstitutional actions by government servants;

(b) where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff; and

(c) where statute expressly authorised it.

[20] In the instant case, the claim for exemplary damages obviously falls under the first category. The learned senior federal counsel argued based on the case of *Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1993] 1 MLJ 443 that the exemplary damages should be limited to 25% of the compensatory damages. In other cases, higher exemplary damages have been awarded. However, there is no fixed formula for awarding exemplary damages (per Mokhtar Sidin JCA in *Sin Heap Lee-Marubeni Sdn Bhd v Yip Shou Shan* [2005] 1 MLJ 515). Another principle that must be considered in assessing exemplary damages is whether the compensatory damages that were awarded are adequate. In *Chong Siew Chiang v Chua Ching Geh & Anor* [1995] 1 MLJ 551 Richard Malanjum J (as His Lordship then was) said as follows:

> Restraint should be exercised in assessing exemplary damages ... Before considering any exemplary damages it must be considered first whether the sum in mind for compensatory damages would be adequate. If it is not, in view of the outrageous conduct of the defendant and to indicate disapproval of such conduct and as a deterrence, an additional sum may be added to bring the sum sufficient as punishment.

[21] The learned deputy registrar gave no reason for awarding RM250,000 as exemplary damages. In *Syarizan bin Sudirmin & Ors v Abdul Rahman bin Bukit & Anor*, only RM50,000 was awarded. In that case, the first defendant had kicked the plaintiff off his motorcycle. In the instant case, the first defendant had fired three shots at the plaintiff. However, in my view, RM250,000 is unjustified as the plaintiff has already been awarded RM300,000 for pain and suffering and loss of amenities. I shall therefore reduce the award for exemplary damages from RM250,000 to RM100,000. The said award shall bear post judgment interest of 5% from 28 February 2013.

AGGRAVATED DAMAGES

[22] Learned counsel for the plaintiff submitted that the deputy registrar should have also awarded aggravated damages. The reason for the aggravated damages relates to the alleged misconduct of the deputy public prosecutor in preferring a lighter charge against the first defendant and misrepresenting the true facts of the case in the criminal court. However, the learned senior federal counsel has correctly pointed out that this court is precluded from considering an award for aggravated damages because the plaintiff did not appeal against the decision of the deputy registrar in respect of the same. As I agree with this argument, I shall not delve into the merits of the submission of counsel for the plaintiff in respect of appropriateness of exemplary damages in this case.

PRE-TRIAL AND POST-TRIAL COST OF NURSING CARE

[23] The learned deputy registrar awarded pre-trial nursing care expenses in the sum of RM106,800. The period of pre-trial nursing care was between the date of incident, ie 26 February 1996 to the conclusion of the assessment hearing, ie 2010 which is 178 months after rounding off. The multiplicand that he used, ie the cost of a hiring a caregiver on a monthly basis is RM600. As for post trial or future costs of nursing care, the deputy registrar awarded £46,400 at the rate of 8%pa from January, 2001 to the date of full payment. The multiplicand he used was £800 as the plaintiff produced evidence that trained caregivers in the United Kingdom would charge around that rate per week. The multiplier that the deputy registrar used was four years and ten months (58 months in total). He presumably took into account the statutory multiplier under s 28 of the Civil Law Act 1956 as submitted by the senior federal counsel. He did not give his reason for using the multiplier of 58 months.

[24] The learned senior federal counsel submitted the following grounds to question the decision of deputy registrar:

(a) there was no direct evidence in respect of the life expectancy of the plaintiff;

(b) therefore the statutory multiplier should have been applied for both pre trial and future cost of nursing care;

(c) the assessment should have been based on the period between the service of the writ and date of judgment which is 8 March 2001;

(d) alternatively, the common law approach should have been adopted and by which method, the plaintiff would no longer be entitled to future costs of care; and

(e) interest for future nursing care should not have been awarded.

[25] The plaintiff tendered evidence in the form of a printout from the CIA website that states that the life expectancy of a United Kingdom male is 79 years old. The senior federal counsel submitted that the printout from the CIA (Central Intelligence Agency of the United States of America) website is not evidence and that the court cannot take judicial notice of it. Therefore, he suggested that, in the alternative, the statutory multiplier in s 28 of the Civil Law Act should be adopted for both the pre trial and post trial cost of care. It must be noted that the statutory multiplier is for the purpose of assessing loss of earnings and that is the reason the working age in the statutory multiplier is restricted to 55 years. The plaintiff was already 45 years old at the time of the incident and therefore any award for future nursing care using the statutory multiplier would not take into account the fact that the plaintiff would live well beyond 55 years. In fact at the conclusion of the assessment hearing, the plaintiff was already 60 years old. Using the statutory multiplier only for both pre trial and post trial costs of nursing care, learned senior federal counsel submitted the multiplier should be 58 months based on the retirement age of 55 years. He submitted that monthly cost of nursing care of RM500 is sufficient as the plaintiff was not in a vegetative state. Therefore, the total award for pre-trial and post-trial costs of care should only be RM29,000. Alternatively, he submitted that if the common law base age of 65 is adopted for use in the multiplier, the plaintiff is entitled to the total award of RM84,000. The calculation is as follows:

Pre trial nursing care : RM 500.00 x 12 months x 3 years = RM18,000.00

Post trial nursing care : RM 500.00 x 12 months x 11 years = RM 66,000.00

Total amount: RM 18,000.00 + RM 66,000.00 = RM 84,000.00

Finally, the senior federal counsel also submitted that no interest for future nursing case should be awarded.

[26] On the other hand, counsel for the plaintiff submitted that the plaintiff should be awarded £800 per week from date of conclusion of the assessment trial until the plaintiff reaches the age of 79 which is about RM3,501,913 after currency conversion at the rate of 4.95. She urged the court to take judicial notice of the CIA website information. She submitted that the United Kingdom costs of hiring a trained care giver for the plaintiff has not been rebutted by the defendants.

[27] Although the deputy registrar did not give reasons, he found that the plaintiff required a caregiver as his head injuries were extensive. Following a period of convalescence after the shooting incident, the plaintiff resigned from his job as a yacht maintenance specialist cum marina manager in Kota Kinabalu. He went to resume work in Brunei until September of 2010. However, evidence was tendered by him that he required to be looked after even though he resumed working. His caregiver during this period was his wife.

A It is apparent that the deputy registrar accepted the evidence of the plaintiff, his wife and the medical specialists on this point because he awarded pre-trial nursing care costs. Malaysian courts have adopted the decision in *Cunningham v Harrison* [1973] 1 QB 942 that care provided by a relative or spouse must be rewarded with monetary compensation (see *Liong Thoo v Sawiyah & Ors* B [1982] 1 MLJ 286, *Ahmad Daman Huri bin Hussein v Koo Chin Yau* [1990] 3 MLJ 53 and *Marappan & Anor v Siti Rahmah bte Ibrahim*). In the instant case, the learned senior federal counsel did not dispute that the plaintiff needed the services of a caregiver after the trial. He also did not dispute that his wife looked after him and ought to be compensated. However, he disputed the quantum C (multiplicand), the time period (multiplier) and the interest rate in respect of the award for pre-trial and future costs of nursing care. I shall now consider the issues in respect of the cost of nursing care that have been raised by the parties.

D **[28]** In respect of life expectancy, I agree with the senior federal counsel that the court cannot take judicial notice of the said printout from the CIA website. The plaintiff should have given evidence through the medical witnesses who had testified on his behalf. However, that does not mean that the court should ignore the fact that the plaintiff requires a certain level of nursing care and E would live beyond retirement age. In fact, as I noted earlier, by the time of the assessment hearing he had retired from working at the age of 60. This does not mean that there should be no award for future nursing care merely because the information from the CIA website is not admissible. In some local cases, the court had accepted evidence from the Malaysian Statistics Department in F respect of the life expectancy. In the case of *Muhamad Ayub Zulkifli v Zolazree Zolkeflee & Anor* [2011] 1 LNS 1428, the court accepted that the life expectancy of a Malaysian male is around 72 years. Gunalan JC in the above mentioned case said as follows:

> G Based on the trend of decisions, it would appear that the proper approach would be to take the current average life expectancy in calculating the correct multiplier. I, therefore, upheld the contention of the appellant that the learned SCJ had erred in principle in deciding that the life expectancy of P1 was around 65 years based on authorities that were no longer relevant on this issue. I held that the suggested figure of 72 years was a correct estimate in the present times.

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[29] In *Bujang bin Mat & Anor v Lai Tzen Hai & Anor* [2004] 6 MLJ 376, the court accepted that the life expectancy of Malaysian male at that time was 69 years old.

I **[30]** In the instant case, the senior federal counsel submitted that bullet fragments are still lodged inside the brain of the plaintiff and that his life expectancy is substantially reduced. He also submitted that the plaintiff did not tender evidence to the contrary. In my view, there is no merit in this submission. The medical evidence tendered was to the effect that the brain

scarring would not affect life expectancy. Therefore, since there is no direct evidence to the effect that the life expectancy of the plaintiff would be significantly shortened, there is no basis to accept the submission of the senior federal counsel on this point. The defendants should have tendered evidence that the life expectancy of the plaintiff had been reduced if they wanted to pursue this point. After all, the plaintiff was also examined by a panel of medical experts of the defendants. In the absence of admissible evidence in respect of the life expectancy of a United Kingdom male, my view is that at least the present Malaysian male life expectancy of 72 years should be used to calculate the multiplier. It is also my view that the statutory multiplier in s 28 of the Civil Law Act would severely limit the award for costs of future nursing case as it is meant to calculate loss of earnings only.

[31] In respect of the multiplicand, the senior federal counsel had submitted that RM500 is reasonable as the plaintiff was still able to work despite serious injuries and that he is not in a vegetative state. It is entire possible that in Malaysia, one can hire a domestic helper for a far modest amount than £800 per week. The learned deputy registrar fixed the multiplicand at RM600 per month for pre-trial cost of care. However, counsel for the plaintiff submitted that the plaintiff who is a United Kingdom citizen would be returning to Scotland and the cost of hiring a trained care giver is at least £800 per week. The learned deputy registrar allowed £800 per week but he fixed the multiplier at 58 months. In my view, £800 per week is unjustified for the following reasons. The first reason is that, as submitted by the senior federal counsel, the plaintiff in the instant case, despite sustaining serious injuries, had not been reduced to 'vegetative state' or even a 'wheel chair existence'. He had still managed to work after the incident with the assistance of his wife for few years. My second reason is that the plaintiff had elected to live and work in Malaysia at the material time. Therefore any award, including an award for costs of nursing care, should be based on local rates. Otherwise, damages that are not foreseeable would be awarded. The deputy registrar found that RM600 a month is reasonable for pre-trial care that was rendered by the wife of the plaintiff. In cases where the victim had sustained far more serious injuries than the instant plaintiff, courts have only awarded around RM750 a month. However, it is indisputable that the plaintiff had suffered serious brain injury in this case. Five specialists called by the plaintiff gave evidence that the plaintiff would continue to suffer intellectual impairment indefinitely. I therefore find that RM600 a month is reasonable for future nursing care as well. For the pre-trial cost of nursing care, ie between the time of the incident and the conclusion of the assessment hearing, the deputy registrar awarded RM106,800 based on the multiplier of 178 months. The learned senior federal opined that RM500 is more reasonable. The senior federal counsel also submitted that the pre-trial costs of care should be assessed between the service of the writ and date of judgment which is 8 March 2001. In my view, the date of 8 March 2001, would not make any difference to the calculation as I find that the plaintiff is entitled to costs of

nursing care until the age of 72. Therefore, I shall uphold the deputy registrar's decision to grant pre-trial costs of nursing care in the sum of RM106,800 at 8%pa from the date of service of the writ to 8 March 2001 and statutory interest of 8%pa from 8 March 2001 to date of payment. The appeal of the defendants on the said award is therefore dismissed.

[32] In respect of cost of future nursing costs, I shall award RM86,400 with post judgment interest of 5% pa from 28 February 2013 until full payment. This is based on the multiplier of 12 years and the multiplicand of RM600 per month. The multiplier is calculated from December 2010 when the assessment trial concluded until the age of life expectancy of 72 years. However, in my view the future nursing care award of RM86,400 should not carry interest from the date of service of the writ because nursing care costs that would be incurred in the future are claimable immediately. The decision of the deputy registrar in respect of future cost of nursing care is therefore varied to the above extent.

CLAIM FOR SPECIAL DAMAGES OF RM14,311.66

[33] In para 2 of the judgment dated 8 March 2001, the court granted special damages under para 12 of the amended statement of claim in the sum of RM149,423.35. However, during the assessment hearing, the plaintiff claimed a further RM14,311.66 which were incurred as medical expenses after 8 March 2001. The receipts to support these expenses were produced by the plaintiff. However, the learned deputy registrar did not make any award under this head of special damages for the reason that it had already been 'settled'. He made this statement because the special damages award in the sum of RM149,423.35 in the judgment dated 8 March 2001 had already been paid to the plaintiff. The learned senior federal counsel submitted that special damages in the sum of RM14,311.66 cannot be awarded because they do not fall under prayers (2) and (4) of the judgment dated 8 March 2001. He further submitted that special damages must be pleaded and particularised in the pleadings. Prayers (2) and (4) in the said order refer to the special damages that were pleaded under para 12 in the sum of RM149,423.35. These special damages were granted by the court and were fully paid. In my view, there is merit in the argument of the senior federal counsel. It is trite law that special damages must be particularised and pleaded. In the instant case, assessment of damages was only ordered in respect of general damages. I shall therefore dismiss the appeal of the plaintiff in respect of the decision of the deputy registrar not to grant further special damages of RM14,311.66.

CONCLUSION

[34] In conclusion, I have made the following orders:

(a) I shall reduce the award of the deputy registrar in respect of the award for pain and suffering and loss of amenities from RM500,000 to RM300,000 The said award shall carry interest of 8%pa from date of service of writ to full payment;

(b) I shall reduce the award for exemplary damages from RM250,000 to RM100,000. The said award shall bear post judgment interest of 5%pa from 28 February 2013 to full payment;

(c) in respect of pre-trial nursing care, I shall affirm the decision of the deputy registrar to award RM106,800 at 8%pa from the date of service of the writ to 8 March 2001 and statutory interest on RM106,800 at 8%pa from 8 March 2001 to date of payment;

(d) in respect of cost of future nursing costs, I shall reduce the award of the deputy registrar from £46,400 to RM86,400. There shall be post judgment interest of 5%pa from 28 February 2013 until full payment;

(e) I shall affirm the decision of the deputy registrar not to award special damages of RM14,311.66;

(f) I shall affirm the decision of the deputy registrar not to grant damages for loss of earning capacity;

(g) I shall affirm the award of RM60,000 at the rate of 8%pa from the date of service of the writ to 8 March 2001 in respect of general damages for future medical expenses; and

(h) I shall affirm the order of costs made by the deputy registrar.

[35] As the parties partially succeeded in this appeal, I make no order of costs in respect of the appeal to judge in chambers.

Order accordingly.

Reported by Kanesh Sundrum